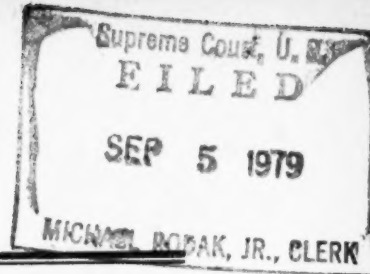


79-441



IN THE
Supreme Court of the United States

OCTOBER TERM, 1979

—♦—
ST. CLAIR GRIFFITH, JR.,
Petitioner,
vs
UNITED STATES OF AMERICA,
Respondent.
—♦—

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT
—♦—

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TABLE OF CONTENTS

	Page
OPINION BELOW	2
JURISDICTION	2
QUESTION PRESENTED	2
STATEMENT OF THE CASE	2
REASONS FOR GRANTING WRIT	3
RELIEF REQUESTED	7
 APPENDIX:	
APPENDIX A — Decision of the United States Court of Appeals for the Sixth Circuit dated June 15, 1979	9
APPENDIX B — Order Denying Petition for Rehearing	10
APPENDIX C — Search Warrant	11

TABLE OF AUTHORITIES

Supreme Court Cases:

Aguilar v. Texas, 378 U.S. 108 (1963)	5
Jones v. United States, 362 U.S. 257 (1960)	5
McCray v. Illinois, 386 U.S. 300 (1967)	6
Roviaro v. United States, 353 U.S. 53 (1957)	6
Spinelli v. United States, 393 U.S. 410 (1969)	4

	Page
United States v. Harris, 403 U.S. 573 (1971)	5
United States v. Ventresca, 380 U.S. 102 (1965) . . .	4
Court of Appeals Cases:	
Lloyd v. United States, 400 F.2d 414 (6th Cir. 1968)	7
United States v. Check, 582 F.2d 668 (2nd Cir. 1978)	6
United States v. Edmond, 548 F.2d 1256 (6th Cir. 1977)	5
United States v. Fruend, 525 F.2d 873 (5th Cir. 1976)	7
Statutes:	
18 U.S.C. § 924(b)	4
21 U.S.C. § 844(a)	4
21 U.S.C. § 841(a)(1)	4
28 U.S.C. § 1254(1)	2

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ST. CLAIR GRIFFITH, JR. by and through his attorneys, S. ALLEN EARLY, JR. and N. C. DEDAY LARENE, petitions for a Writ of Certiorari to review the decision of the United States Court of Appeals for the Sixth Circuit, affirming his Conviction on two counts — possession of heroin with intent to distribute and possession of cocaine with intent to distribute both in violation of Section 841(a) (1), Title 21, United States Code.

"C.A.App." refers to the Petitioner's appendix in the Court of Appeals, a copy of which is being lodged with the Clerk of this Court. "App." refers to pages appended hereto.

OPINION BELOW

(Unreported, set forth in full as Appendix A, hereto.)

JURISDICTION

The Judgment of the Sixth Circuit Court of Appeals was filed on June 15, 1979; the Petition for Rehearing was denied on August 16, 1979. The jurisdiction of this Court is involved under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

Whether the governmental use of a nameless, faceless informant to supply information for a boiler-plate search warrant, point the accusing finger at trial through hearsay testimony of the case agent, and finally be the moving force and convincing voice again through hearsay testimony of the case agent in a bond revocation hearing after conviction, violated Petitioner's rights to be safe from unreasonable search and seizure, to confrontation and to effective assistance of counsel.

STATEMENT OF THE CASE

On the morning of September 16, 1977, Petitioner's residence at 24410 Santa Barbara, Southfield, Michigan was searched by Drug Enforcement Administration (DEA) agents pursuant to a search warrant. The information for the warrant was provided by an unnamed informant. (See Search Warrant Affidavit, Appendix C.) Inside a closet, between the kitchen and the utility room (C.A.App./T.T. 121A) in a common area

of the house (C.A.App./T.T. 134A) an agent found a cloth bag (C.A.App./T.T. 121A). Within the cloth bag were plastic baggies containing what analyses proved to be heroin (C.A.App./T.T. 212A). Petitioner's fingerprint was found on one bag. In the same closet, the agent found a small amber vial containing what analyses revealed to be cocaine (C.A.App./T.T. 216A). No one claimed these substances (C.A.App./T.T. 134A).

A Motion to Suppress was filed, an evidentiary hearing (C.A.App./T.T. 16-17) was held, and the motion was denied (C.A.App./T.T. 88). Agent Antonucci, the case agent testified during the suppression hearing and at trial. While at the suppression hearing he stated that he did not have any further information from the informant than that in the affidavit (C.A.App./T.T. P. 29); a good deal of hearsay statements from the informant came in during the trial. (C.A.App./T.T. 106-7A); (C.A.App./T.T. 110A); (C.A.App./T.T. 112A).

Petitioner's adult sister and brother testified that they were living with Petitioner, his wife, and children at the time in question (C.A.App./T.T. 30-31C, 50C)

Following the trial, a bond revocation hearing was held (C.A.App./T.T. 6-9) in which the case agent once again used hearsay statements of the same nameless, faceless informant (C.A.App. 17). This testimony caused Petitioner's bond to be revoked.

REASONS FOR GRANTING THE WRIT

One of the main thrusts of the appeal and the brief submitted in support thereof was that no probable cause whatsoever existed for issuance of a search warrant. This was not discussed in the Opinion of the

Court (Appendix A). The holding of the Sixth Circuit Court of Appeals that the trial judge had not abused his discretion in denying a disclosure of the informant was totally inopposite with one of the thrusts of the appeal decision that such a petition should have been made was never made; and, therefore, the trial judge was never called upon to exercise his discretion.

Use of the Informant to Provide Probable Cause

A careful analysis of the search warrant affidavit shows that it neither states facts nor circumstances constituting probable cause.

Agent Antonucci did not speak from first hand knowledge of any fact supportive of probable cause, and his reliance on the flat statement of an informant that he had seen narcotics in the premises — and nothing else — was fatally deficient. The Supreme Court stated in *Spinelli v. United States*, 393 U.S. 410 (1969):

“Where as here, the informer’s tip is a necessary element in a finding of probable cause, its weight must be determined by a more precise analysis.”

Initially, it must be noted that the affidavit fails to state a crime. It is not enough to merely state a code section allegedly violated. While citing 21 U.S.C. § 844(a) (Possession of a Controlled Substance); 21 U.S.C. § 841(a) (1) (Possession with Intent to Distribute), and 18 U.S.C. § 924(b) (Firearms Statute) the magistrate was provided with no facts on which to base a finding that federal law had been violated, *United States v. Ventresca*, 380 U.S. 102 (1965).

There was no allegation of possession by anyone, only the statement of presence of a “brown powdery substance” and a “white powdery substance.” (C.A. App. 13). Without more, probable cause is not established. Mere presence of a brown or white powder without more does not state a crime. There is nothing to show that any individual was in possession of or intended to distribute a controlled substance.

In dealing with the use of the informer to establish probable cause in this case, it is apparent that the standards for such use have not been met. While a magistrate may rely on hearsay information received by the affiant from a confidential informer to establish probable cause, *Jones v. United States*, 362 U.S. 257 (1960); *United States v. Edmond*, 548 F.2d 1256 (6th Cir. 1977), the Supreme Court has announced specific standards to guard against the very real abuses of the informant system. *Aguilar v. Texas*, 378 U.S. 108 (1963); *Spinelli, supra*; *United States v. Harris*, 403 U.S. 573 (1971). The Court in *Aguilar v. Texas*, 378 U.S. 108, 114 stated:

“[T]he magistrate must be informed of some of the underlying circumstances from which the informant concluded that the narcotics were where he claimed they were.”

Such underlying circumstances are necessary to protect a citizen from casual rumor, *Spinelli v. United States, supra*, at 643 or a vindictive attempt to satisfy a grudge by suggesting rather than alleging misconduct. Petitioner must legitimately question whether an informant actually existed due to the boiler-plate nature of the affidavit (See Affidavits by Antonucci — C.A.App. 89-94)

Courts have held that the second branch of the *Aguilar* test may be satisfied by the affiant's declaration that the informant had given reliable information in the past. The requirement of the first prong of the test is not, however, met by any recital of the underlying facts upon which the informant based his conclusions. While the affidavit purports to recount the personal observation of the informant, the affidavit contains no statement of the underlying circumstances on which to base the belief that the premises were being used for the commission of a crime. There are no circumstances presented in the case at hand which would bring the affidavit beyond this proscribed degree of speculation.

Use of Informant Hearsay

Apart from his role in the procurement of a search warrant, the informant was the only individual who, it can be surmised, had information relating to the possession of narcotics on the premises (C.A.App./T.T. 106-7A). This is especially true when the testimony of the agent at the suppression hearing was at odds with his testimony at trial (C.A.App. 29) (C.A.App./T.T. 106-7A, 110A). Thus, the informant was "critical" to the issues of guilt and innocence, *Roviaro v. United States*, 353 U.S. 53 (1957); *McCray v. Illinois*, 386 U.S. 300 (1967), and should have been produced.

Agent Antonucci filled the record with hearsay statements of the informant, corroborating without subjecting the informant to cross-examination. *United States v. Check*, 582 F.2d 668 (2nd Cir. 1978). The devastating effect was a conviction and revocation of bond pending appeal.

Informants should be produced not only where they are active participants in the crime but also where they may be able to shed some light on the circumstances and support a possible defense theory. *United States v. Fruend*, 525 F.2d 873, cert. denied, 486 U.S. 978 (5th Cir. 1976); *Lloyd v. United States*, 400 F.2d 414 (6th Cir. 1968).

For the Sixth Circuit to say that the trial court did not abuse its discretion in this regard is clearly in error when the request was never made and *no* discretion was therefore necessitated. Appellant was denied his constitutional rights to confrontation and effective assistance of counsel in that his attorney never requested the identity or production of the informant.

RELIEF REQUESTED

For the foregoing reasons, Petitioner prays that his Petition for Certiorari be granted.

Respectfully submitted,
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N. C. DEDAY LARENE
810 Buhl Building
Detroit, Michigan 48226
Telephone: (313) 963-6093

Dated: September 12, 1979

APPENDIX A

Decision of the United States
Court of Appeals for the Sixth Circuit
dated June 15, 1979

(United States of America, Plaintiff-Appellee, vs. St. Clair Griffith, Defendant-Appellant. No. 78-5472)

Before: EDWARDS, Chief Judge, WEICK, Circuit Judge, and CECIL, Senior Circuit Judge.

On receipt and consideration of a direct appeal from a jury verdict of guilty on two counts charging possession of a controlled substance, in violation of 21 U.S.C. § 841(a)(1) (1976); and

Finding in this record ample evidence from which the jury could have concluded that appellant was in possession of the heroin and cocaine found in a closet in his home; and

Finding no legal error or abuse of discretion in the trial judge's refusal to disclose the name of the informant who supplied information for the search warrant and in refusing to suppress the evidence seized under the search warrant or to deny the admission of the six guns found in the residence,

Now, therefore, the judgments of conviction are affirmed.

Entered by order of the Court

/s/ John P. Hehman
Clerk

ISSUED AS MANDATE: AUGUST 30, 1979

APPENDIX B

ORDER DENYING PETITION
FOR REHEARING(United States Court of Appeals
For the Sixth Circuit)

(Filed April 16, 1979)

(United States of America, Plaintiff-Appellee, vs. St.
Clair Griffith, Jr., Defendant-Appellant. 78-5472)Before: EDWARDS, Chief Judge, WEICK, Circuit
Judge and CECIL, Senior Circuit Judge.

On receipt and consideration of a motion for leave to
file a petition for rehearing out of time and a petition
for rehearing filed coincidentally, the motion for leave
to file the petition for rehearing out of time is hereby
granted.

The petition for rehearing is however denied since in
the opinion of this court it presents no argument which
was not carefully considered by this court prior to the
filing of this court's order affirming the judgments of
conviction on June 15, 1979.

ENTERED BY ORDER OF THE COURT

/s/ John P. Hehman
Clerk

APPENDIX C

SEARCH WARRANT

(United States District Court
For the Eastern District of Michigan
Southern Division)(United States of America vs 24410 Santa Barbara,
Southfield, Michigan)To U.S. Marshall or any Other Duly Authorized
Agent

Affidavit(s) having been made before me by S/A
Louis Antonucci, Drug Enforcement Administration
that he has reason to believe that on the premises
known as 24410 Santa Barbara, Southfield, Michigan,
said premises being described as a one story tan brick
dwelling with black and white trim, a double front door
and a black and white attached garage door, having a
semi-circle driveway and wooden-fenced backyard; said
dwelling being the 2nd house north of Mt. Vernon on
the east side of Santa Barbara.

*** in the Eastern District of Michigan there is now
being concealed certain property, namely quantities of
heroin, a Schedule I Narcotic Drug Controlled Substance;
quantities of cocaine, a Schedule II Drug Controlled
Substance; the means and instrumentalities utilized for
the possession, dilution or distribution or said narcotic
drugs, including but not limited to dextrose, lactose,
plastic bags, coin envelopes, strainers, measuring
spoons, etc.; and any and all evidence of narcotic use,
possession or distribution including monies which are
the proceeds of said narcotic distribution, records of

any kind describing narcotic transactions; a pistol of unknown make and caliber; all in violation of 21 USC 844(a), 841(a)(1) and 18 USC 924(b).

and as I am satisfied that there is probable cause to believe that the property so described is being concealed on the person or premises above described and that grounds for application for issuance of the search warrant exist as stated in the supporting affidavit(s).

You are hereby commanded to search within a period of 72 hours (not to exceed 10 days) the person or place named for the property specified, serving this warrant and making the search [in the daytime (6:00 a.m. to 10:00 p.m.) at any time in the day or night*] and if the property be found there to seize it, leaving a copy of this warrant and receipt for the property taken, and prepare a written inventory of the property seized and promptly return this warrant and bring the property before (Federal judge or magistrate) as required by law.

Dated this 15th day of September, 5:38 p.m., 1977

Judge (Federal or State Court of Record) or
Federal Magistrate

*The Federal Rules of Criminal Procedure provide: "The warrant shall be served in the daytime, unless the issuing authority, by appropriate provision in the warrant, and for reasonable cause shown, authorizes its execution at times other than daytime." (Rule 41(c)). A statement of grounds for reasonable cause should be made in the affidavit(s) if a search is to be authorized "at any time day or night" pursuant to Rule 41(c).

Special Agent Louis Antonucci, Drug Enforcement Administration, being first duly sworn, deposes and says:

1. That he is a special agent of the Drug Enforcement Administration (DEA) and has been so employed since June of 1971.

2. That on September 15, 1977 affiant was notified by a reliable confidential informant who had been at the residence located at 24410 Santa Barbara, Southfield, Michigan and viewed over a kilogram of a brown powdery substance, which the informant believed to be heroin, based upon his observation and knowledge, located in the living room of the above-described premises.

3. That the confidential informant has advised the affiant of the quality, texture and color of the heroin and that the affiant knows that the informant is familiar with heroin and its identifying characteristics.

4. That also within the last 48 hours at the above address, said above informant observed at 24410 Santa Barbara, Southfield, Michigan and viewed a quantity of a white powdery substance, which the informant believed to be cocaine based upon his observation and knowledge, located in the living room of the above-described premises.

5. That the confidential informant has advised the affiant of the quality, texture and color of the heroin [sic] and that the affiant knows that the informant is familiar with cocaine and its identifying characteristics.

6. That also within the last 48 hours at the above address, said above informant observed at 24410 Santa Barbara, Southfield, Michigan a pistol of unknown make and caliber.

7. Said confidential informant is reliable in that he/she has provided information to the DEA for the past 4 years which has proven consistently reliable and has resulted in two previous cases, involving six arrests and five convictions. Furthermore, said confidential informant personally observed the above-named narcotics and pistol within the last 48 hours.

8. That the affiant has personally corroborated some of the tips and details provided by the informant, such as the vehicle being utilized by the resident of the above-described address, and that utilities are listed to the individual at above-described address.

9. That the affiant knows from his personal experience as a Special Agent of the Drug Enforcement Administration that those who traffic in narcotics generally keep firearms on the premises to protect the narcotics they distribute and the proceeds of said narcotic distribution.

LOUIS ANTONUCCI
Special Agent
Drug Enforcement Administration

Subscribed and sworn to before me this 15th day of September, 1977.

PAUL J. KOMIVES
United States Magistrate